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No. 03-1034

In the Supreme Court of the United States

ESTATE OF BURTON W. KANTER, DECEASED, ET AL.,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

When a case is assigned to a Special Trial Judge of the Tax Court, the Special Trial Judge is to make a "report, including findings of fact and opinion, to the Chief Judge, and the Chief Judge will [then] assign the case to a Judge or Division of the Court." T.C. R. 183(b). The Judge to whom the case is thus assigned "may adopt the Special Trial Judge's report or may modify it or may reject it in whole or in part." T.C. R. 183(c). The questions presented in this case are:

1. Whether the Due Process Clause requires that the "original" report of the Special Trial Judge be made public by inclusion in the record.

2. Whether 26 U.S.C. 7459(b), 7461(a), (b), or 7482 requires that the "original" report of a special trial judge be made public by inclusion in the record.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	21

TABLE OF AUTHORITIES

Cases:

Atlas Roofing Co. v. *Occupational Safety & Health Review Comm'n*, 430 U.S. 442 (1977)	18
Bakelite Corp., Ex parte, 279 U.S. 438 (1929)	17
Ballard v. *Commissioner*, 321 F.3d 1037 (11th Cir. 2003), petition for cert. pending, No. 03-184	5, 7, 9, 14, 15
Ballard, In re, No. 00-14762-H (11th Cir. Oct. 23, 2000)	5
C. Blake McDowell, Inc. v. *Commissioner*, 67 T.C. 1043 (1977), vacated and remanded, 576 F.2d 718 (6th Cir.), on remand, 71 T.C. 71 (1978), aff'd, 652 F.2d 606 (6th Cir. 1980)	13
Checkosky v. *SEC*, 23 F.3d 452 (D.C. Cir. 1994)	14
Colorado v. *New Mexico*, 467 U.S. 310 (1984)	15
Cook, In re, 49 F.3d 263 (7th Cir. 1995)	9
Crowell v. *Benson*, 285 U.S. 22 (1932)	17
Erhard v. *Commissioner*, 46 F.3d 1470 (9th Cir.), cert. denied, 516 U.S. 930 (1995)	15, 20
Estate of Lisle v. *Commissioner*, 341 F.3d 364 (5th Cir. 2003)	7, 15, 21
Estate of Varian v. *Commissioner*, 396 F.2d 753 (9th Cir.), cert. denied, 393 U.S. 962 (1968)	11, 15
Fayerweather v. *Ritch*, 195 U.S. 276 (1904)	9

Cases—Continued: Page

Freytag v. *Commissioner*:
904 F.2d 1011 (5th Cir. 1990), aff'd, 501 U.S. 868 (1991) 16
501 U.S. 868 (1991) 3
Goetz v. *Crosson*, 41 F.3d 800 (2d Cir. 1994), cert. denied, 516 U.S. 821 (1995) 9
Halle v. *Commissioner*, 175 F.2d 500 (2d Cir. 1949), cert. denied, 338 U.S. 949 (1950) 11
Heim v. *Commissioner*, 251 F.2d 44 (8th Cir. 1958) 11, 15
Helvering v. *Mitchell*, 303 U.S. 391 (1938) 18
Hilton v. *Commissioner*, 74 T.C. 305 (1980) 13
Holly Farms Corp. v. *NLRB*, 517 U.S. 392 (1996) 19
Investment Research Ass'ns & Sub. & Burton W. & Naomi R. Kanter, In re, No. 00-3369 (7th Cir. Dec. 15, 2000) 5
Kansas City S. Ry. v. *Commissioner*, 76 T.C. 1067 (1981) 13
La Fargue v. *Commissioner*, 73 T.C. 40 (1979) 13
Landry v. *FDIC*, 204 F.3d 1125 (D.C. Cir.), cert. denied, 531 U.S. 924 (2000) 17
Lawn v. *United States*, 355 U.S. 339 (1958) 19
Lisle, In re, No. 00-60637 (5th Cir. Sept. 18, 2000) 5
Mathews v. *Eldridge*, 424 U.S. 319 (1976) 18
Mazza v. *Cavicchia*, 105 A.2d 545 (N.J. 1954) 11
Morgan v. *United States*, 298 U.S. 468 (1936) 9, 10, 15, 17
Murray's Lessee v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1855) 17, 18
NLRB v. *Mackey Radio & Tel. Co.*, 304 U.S. 333 (1938) 10
Narver v. *Commissioner*, 75 T.C. 53 (1980) 13
North Pipeline Constr. Co. v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982) 17

Cases—Continued: Page

Ocean Sands Holding Corp. v. *Commissioner*, 41 T.C.M. (CCH) 1 (1980) 13
Old Colony Trust Co. v. *Commissioner*, 279 U.S. 716 (1929) 18
Orzechowski v. *Commissioner*, 69 T.C. 750 (1978) 13
Peoria Braumeister Co. v. *Yellowley*, 123 F.2d 637 (7th Cir. 1941) 10-11
Renegotiation Bd. v. *Grumman Aircraft Eng'g Corp.*, 421 U.S. 168 (1975) 16
Seaside Improvement Co. v. *Commissioner*, 105 F.2d 990 (2d Cir.), cert. denied, 308 U.S. 618 (1939) 11
Stone v. *Commissioner*, 865 F.2d 342 (D.C. Cir. 1989), rev'g *Rosenbaum* v. *Commissioner*, 45 T.C.M. (CCH) 825 (1983) 16
TRW Inc. v. *Andrews*, 534 U.S. 19 (2001) 19
Towers v. *Commissioner*, 247 F.2d 233 (2d Cir. 1957), cert. denied, 355 U.S. 914 (1958) 11, 15
United States v. *Crouch*, 566 F.2d 1311 (5th Cir. 1978) 9
United States v. *Magana*, 118 F.3d 1173 (7th Cir. 1997), cert. denied, 522 U.S. 1139 (1998) 19
Utica Mut. Ins. Co. v. *Vincent*, 375 F.2d 129 (2d Cir.), cert. denied, 389 U.S. 839 (1967) 10

Constitution, statutes and rules:

U.S. Const. Art. III 17, 19
Internal Revenue Code (26 U.S.C.):
§ 6511 19
§ 6532 19
§ 7422 19
§ 7443A(a) 8
§ 7443A(b)(1)-(3) 7
§ 7443A(b)(4) 2, 3, 7, 8
§ 7443A(b)(5) 8
§ 7443A(c) 7, 8, 15
§ 7453 8

Statutes and rules—Continued: Page

§ 7459 12
§ 7459(b) 6, 19, 20
§ 7460(b) 11, 15, 19
§ 7461(a) 6, 19
§ 7461(b) 6, 19
§ 7482 20
§ 7482(a)(1) 12
Revenue Act of 1928, ch. 852, § 601, 45 Stat. 871 (26 U.S.C. 7460(b)) 11
T.C. R.:
Rule 182(b), 60 T.C 1149 (1973) 16
Rule 182(c), 60 T.C. 1149 (1973) 16
Rule 182(d) 16
Rule 183, 81 T.C. 1045 (1983) 16
Rule 183 ..... 2, 6, 8, 12, 13, 14, 15, 17, 18
Rule 183(b) 12, 14
Rule 183(c) 7, 8, 11, 19

Miscellaneous:

A. Carter, *A History of the English Courts* (7th ed. 1944) 19
H.R. Conf. Rep. No. 844, 68th Cong., 1st Sess. (1924) 19
9 W. Holdsworth, *A History of English Law* (1926) 18

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-97a) is reported at 337 F.3d 833. The opinion of the Tax Court (Pet. App. 98a) is reported at 78 T.C.M. (CCH) 951. The orders of the Tax Court denying petitioners' post-judgment motions (Pet. App. 99a-103a, 107a-112a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 2003. A petition for rehearing was denied on October 21, 2003 (Pet. App. 115a). The petition for a writ of certiorari was filed on January 20, 2004 (a

Tuesday following a holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Burton Kanter, a tax attorney, along with Claude Ballard and Robert Lisle, both vice-presidents of Prudential Life Insurance Co. of America, participated in a scheme in which five persons seeking to do business with Prudential paid kickbacks for such business to Kanter. Kanter then divided the money among himself, Ballard, and Lisle by funneling that money through a complex web of corporations, partnerships and trusts. Pet. App. 16a-17a, 23a-68a.

Kanter failed to report the kickbacks he received as income on his federal income tax returns. After discovering the kickbacks, the Commissioner issued notices of deficiency to Kanter, Ballard and Lisle for the resulting income tax deficiencies and, later, asserted civil fraud penalties. Pet. App. 14a.

2. Kanter, Ballard, and Lisle each sought review of the Commissioner's determinations in the Tax Court. Pet. App. 98a. After their cases were consolidated in the Tax Court, the Chief Judge assigned them to be heard by Special Trial Judge D. Irvin Couvillion pursuant to 26 U.S.C. 7443A(b)(4). After a lengthy trial, the special trial judge submitted a report on these consolidated cases to the Chief Judge as required by Tax Court Rule 183(b). The cases were then referred by the Chief Judge to Tax Court Judge Howard A. Dawson for decision. Pet. App. 98a, 113a. On December 15, 1999, the Tax Court issued an opinion in the consolidated cases which states that "[t]he Court agrees with and adopts the opinion of the Special Trial Judge, which is set forth below." *Id.* at 98a. This opinion of the Tax Court sustained the major portion of

the deficiencies and penalties determined by the Commissioner.

3. Kanter, along with Ballard and Lisle, thereafter filed a motion seeking access to "all reports, draft opinions or similar documents prepared and delivered to the Court pursuant to Rule 183(b)." Pet. App. 107a-108a. In the alternative, they asked the Tax Court to make a copy of such materials part of the record in the case. *Id.* at 108a. The Tax Court denied this motion, stating that (*ibid.*):

> In reviewing the Special Trial Judge's report, Judge Dawson gave due regard to the fact that Special Trial Judge Couvillion evaluated the credibility of witnesses, as reflected in the Memorandum Findings of Facts and Opinion (T.C. Memo. 1999-407), and he treated the findings of fact recommended by the Special Trial Judge as being presumptively correct. * * * [T]he provisions of section 7443A(b)(4) and Rule 183 were followed by the Court.

The Tax Court emphasized that "Petitioners appear not to appreciate the distinction between the special trial judges' authority to hear cases and prepare proposed findings and opinions [under 26 U.S.C. 7443A(b)(4)] and their lack of authority actually to decide those cases, which is reserved exclusively for judges of the Tax Court." Pet. App. 109a (quoting *Freytag* v. *Commissioner*, 501 U.S. 868, 874 (1991)). The Tax Court concluded that, "[i]n any event such materials are confidential and not subject to production because they relate to the internal deliberative processes of the Court. Cf. Sec. 7460(b)." *Ibid.*

Kanter then filed a second motion requesting that the special trial judge's report be included in the record

under seal. That motion was also denied by the Tax Court. Pet. App. 101a.

4. Kanter then moved for reconsideration or for a new trial. Pet. App. 99a. Attached to this motion was an affidavit of his counsel, Randall G. Dick. In that affidavit, Dick stated that he had been informed by two or three unnamed judges of the Tax Court that Special Trial Judge Couvillion had recommended in his "original" report that the kickback "payments made by the [persons seeking to do business with Prudential] were not taxable to the individual Petitioners and that the fraud penalty was not applicable." *Id.* at 102a.

The Tax Court denied that motion in an order signed by Chief Judge Thomas B. Wells, Judge Dawson, and Special Trial Judge Couvillion. Pet. App. 103a. The court stated that "[t]he only official Memorandum Findings of Fact and Opinion by the Court in these cases is T.C. Memo. 1999-407, filed on December 15, 1999, by Special Trial Judge Couvillion, reviewed and adopted by Judge Dawson, and reviewed and approved by former Chief Judge Cohen." *Id.* at 102a. The Tax Court stated that the alleged statements purportedly made to Dick were thus "irrelevant and immaterial." *Ibid.* The court further stated that (*ibid.*):

> Judge Dawson states and Special Trial Judge Couvillion agrees, that, after a meticulous and time-consuming review of the complex record in these cases, Judge Dawson adopted the findings of fact and opinion of Special Trial Judge Couvillion, that Judge Dawson presumed the findings of fact recommended by Special Trial Judge Couvillion were correct, and that Judge Dawson gave due regard to the circumstance that Special Trial Judge Couvillion evaluated the credibility of witnesses.

5. Kanter, along with Ballard and Lisle, then filed petitions for mandamus to the Seventh, Eleventh, and Fifth Circuits, respectively, in which they sought orders directing Judge Dawson and the Tax Court to provide them with a copy of the "original" report prepared by Special Trial Judge Couvillion. In the alternative, they sought an order directing the Tax Court to describe any changes made to the initial report submitted by Special Trial Judge Couvillion. The petitions for writs of mandamus were denied. *In re Investment Research Ass'ns & Sub. & Burton W. & Naomi R. Kanter*, No. 00-3369 (7th Cir. Dec. 15, 2000); *In re Ballard*, No. 00-14762-H (11th Cir. Oct. 23, 2000); *In re Lisle*, No. 00-60637 (5th Cir. Sept. 18, 2000).

6. After the entry of final decisions, Kanter's estate, a petitioner herein,[1] appealed to the Seventh Circuit, Ballard appealed to the Eleventh Circuit, and Lisle's executor appealed to the Fifth Circuit. All three of these courts of appeals rejected the assertion that the proceedings in the Tax Court denied the taxpayers due process of law. Pet. App. 1a-97a; *Ballard* v. *Commissioner*, 321 F.3d 1037, 1042-1043 (11th Cir. 2003), petition for cert. pending, No. 03-184; *Estate of Lisle* v. *Commissioner*, 341 F.3d 364, 384 (5th Cir. 2003).

In the present case, the panel majority noted that the Chief Judge of the Tax Court, Judge Dawson, and Special Trial Judge Couvillion all signed the final opinion, and took that statement "at face value." Pet. App. 7a. The court concluded that "Kanter's arguments are immaterial if the Tax Court's final opinion is the [special trial judge's] report." *Ibid.* The court went on to note that, if a quasi-collaborative deliberative pro-

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[1] Kanter died on October 31, 2001, and his estate was substituted as the petitioner in the Tax Court. Pet. App. 1a.

cess between the special trial judge and the Tax Court judge was involved, since the opinion agreed to and adopted by the Tax Court was the ultimate opinion of the special trial judge, any different preliminary recommendation by the special trial judge would no longer be relevant. *Id.* at 13a.

Judge Cudahy concurred in part and dissented in part. Pet. App. 70a-97a. In his view, failure to include a special trial judge's original report in the record violated petitioner's due process right to "meaningful appellate review." *Id.* at 94a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

Petitioners argue that due process requires that the "original" report of the special trial judge be made public by inclusion in the record so that the appellate court can ensure compliance with Tax Court Rule 183, which provides that the recommended findings of fact of the special trial judge are presumed correct and that due regard be given to the circumstance that the special trial judge had the opportunity to evaluate the credibility of the witnesses. Pet. 13-21. Petitioners similarly argue that Rule 183 requires that findings of the special trial judge contained in his "original" report must be reviewed by the regular Tax Court judge under a clearly erroneous standard, and inclusion of the report in the record on appeal is necessary to determine whether this was done. Pet. 25-29. Finally, petitioners assert that 26 U.S.C. 7459(b), 7461(a) and (b), and 7482 require that the "original" report of a special trial judge be made part of the record on appeal. Pet. 21-25. Peti-

tioners' contentions, which largely reiterate contentions advanced in *Ballard*, petition for cert. pending, No. 03-184, have been rejected by three circuits and are without merit. Pet. App. 1a-97a; *Ballard* v. *Commissioner*, 321 F.3d 1037 (11th Cir. 2003), petition for cert. pending, No. 03-184; *Estate of Lisle* v. *Commissioner*, 341 F.3d 364 (5th Cir. 2003).

1. Petitioners' assertion that they have a due process right to have the "original" report of a special trial judge made public by inclusion in the record fundamentally misperceives the functions and responsibilities of special trial judges and regular judges of the Tax Court in cases assigned to special trial judges for hearing. Authority to determine the facts and law applicable to a case must come from Congress, and Congress has not given the chief judge of the Tax Court authority to allow special trial judges to make the findings and decision in cases that are assigned to them only for hearing. 26 U.S.C. 7443A(b)(4) and (c); see Pet. App. 8a ("The Tax Court thus acts as the original finder of fact."). In light of the requirement that the case must be decided by a regular judge of the Tax Court, Rule 183 provides that reports prepared by special trial judges merely "recommend" findings in the case. T.C. R. 183(c). Thus, the Tax Court, not the special trial judge, was the decisionmaker whose factual findings are subject to appellate review, and petitioners' repeated assertions to the contrary (Pet. 14-19) are simply mistaken.

a. Section 7443A(b)(1)-(3) and (c) of the Internal Revenue Code permit the chief judge of the Tax Court to assign particular types of cases—which are ordinarily small cases—to be heard and decided by special trial judges. 26 U.S.C. 7443A(b)(1)-(3) and (c). At the time relevant to this case, Section 7443A(b)(4) of

the Code (now Subsection (b)(5)) authorized the chief judge to assign "any other proceeding" to special trial judges for hearing and recommended decision only. Any decision in this latter category of cases must be entered by a regular Tax Court judge. 26 U.S.C. 7443A(b)(4) and (c). The present case, involving concealed kickback income received by Kanter, was assigned to the special trial judge only for hearing and recommended decision under this statute. Pet. App. 108a.

The Internal Revenue Code does not prescribe procedures to be employed by the Tax Court in its use of special trial judges. Rather, Congress has authorized the Tax Court to adopt rules prescribing such procedures. 26 U.S.C. 7443A(a), 7453. Rule 183 of the Tax Court was adopted pursuant to this authority. That rule neither authorizes nor requires disclosure to the parties of the reports and recommendations prepared by special trial judges. Instead, in light of the requirement that cases that are assigned only for hearing by a special trial judge must ultimately be decided by a regular judge of the Tax Court (26 U.S.C. 7443A(b)(4) and (c)), Rule 183 states that the reports prepared by the special trial judge merely "recommend" findings and that the judge to whom the chief judge assigns the case "may adopt the Special Trial Judge's report or may modify it or may reject it in whole or in part, or may direct the filing of additional briefs or may receive further evidence or may direct oral argument, or may recommit the report with instructions." T.C. R. 183(c).

A judge of the Tax Court to whom a case is ultimately assigned may thus either (i) adopt or abandon the special trial judge's report in its entirety or (ii) modify or otherwise use the special trial judge's report as a step in the fact-finding process. Under Tax Court

Rule 183, as well as under the deliberative processes of courts generally, communications between the judges (and special trial judges) to whom a case is assigned for disposition are not produced or disclosed to the parties. Pet. App. 109a. See *Goetz* v. *Crosson*, 41 F.3d 800, 805 (2d Cir. 1994), cert. denied, 516 U.S. 821 (1995); *United States* v. *Crouch*, 566 F.2d 1311, 1316 (5th Cir. 1978); *In re Cook*, 49 F.3d 263, 265 (7th Cir. 1995); *Fayerweather* v. *Ritch*, 195 U.S. 276, 306-307 (1904). As the court of appeals emphasized in this case, "there is nothing unusual about judges conferring with one another about cases assigned to them." Pet. App. 13a-14a (quoting *Ballard*, 321 F.3d at 1043).

b. It has, moreover, long been settled that, in cases in which due process requires a trial-type hearing, findings may be made by an officer who has "heard" the evidence in the sense of having reviewed and considered the evidence. Due process does not mandate that the officer charged with making the findings and decision also have personally observed the testimony in the case, or that the officer disclose the work product of examiners who observed the evidence, or that particular deference be given to those examiners. See Pet. 19 ("Petitioner does not argue that the Tax Court should * * * be required to hear witnesses."); Pet. App. 84a (Cudahy, J., dissenting) ("[D]ue process does not require that the ultimate fact finder be constrained by a formal degree of deference to the original hearing officer.").

In *Morgan* v. *United States*, 298 U.S. 468 (1936), this Court explained that, while "[t]he one who decides must hear," this does not require personal observation of the witnesses (*id.* at 481-482) (emphasis added):

> Evidence may be taken by an examiner. Evidence thus taken may be sifted and analyzed by competent subordinates. Argument may be oral or written. The requirements are not technical. But there must be a hearing in a substantial sense. And *to give the substance of a hearing*, which is for the purpose of making determinations upon evidence, *the officer who makes the determinations must consider and appraise the evidence which justifies them.*

In *Morgan*, the examiner who personally heard the testimony declined to prepare a tentative report that could then be subject to argument and exceptions before the Secretary to whom the authority to enter the decision had been given by Congress. *Id.* at 475-476. In rejecting the contention that such a procedure was required, this Court stated that, "while it would have been good practice to have the examiner prepare a report and submit it to the Secretary and the parties, and to permit exceptions and arguments addressed to the points thus presented * * * we cannot say that that particular type of procedure was essential to the validity of the hearing." *Id.* at 478.

Similarly, in *Utica Mutual Insurance Co.* v. *Vincent*, 375 F.2d 129, 131 (2d Cir.), cert. denied, 389 U.S. 839 (1967), the court rejected the contention that, "when there are issues of credibility * * * no determination of fact may be made unless the decider has either seen the witnesses himself or has been furnished with a report as to credibility by another." The court stated that "[e]ven on issues where due process requires a 'trial type' hearing, the due process clause makes no such inexorable command." See *NLRB* v. *Mackey Radio & Tel. Co.*, 304 U.S. 333, 350-351 (1938); *Peoria Braumeister Co.* v. *Yellowley*, 123 F.2d 637, 639 (7th

Cir. 1941) ("The right to receive a copy of the findings of the examiner and of his report, with an opportunity to file exceptions and be heard by brief and in oral argument, is a desirable but not essential ingredient of procedural due process and a fair hearing.")[2]

In the analogous circumstance in which a case that has been tried by one judge of the Tax Court is then reviewed by the full Tax Court, Congress has made clear since the very origins of that court that the "original" opinion of the judge who presided at trial is to be excluded from the record. Revenue Act of 1928, ch. 852, § 601, 45 Stat. 871 (26 U.S.C. 7460(b)). And, the courts of appeals have consistently rejected the contention that these procedures contravene due process. *Estate of Varian* v. *Commissioner*, 396 F.2d 753 (9th Cir.), cert. denied, 393 U.S. 962 (1968); *Heim* v. *Commissioner*, 251 F.2d 44 (8th Cir. 1958). See *Towers* v. *Commissioner*, 247 F.2d 233 (2d Cir. 1957), cert. denied, 355 U.S. 914 (1958); *Halle* v. *Commissioner*, 175 F.2d 500, 504 (2d Cir. 1949), cert. denied, 338 U.S. 949 (1950); *Seaside Improvement Co.* v. *Commissioner*, 105 F.2d 990, 992 (2d Cir.), cert. denied, 308 U.S. 618 (1939).

c. Petitioners are similarly mistaken in arguing that due process requires disclosure of a special trial judge's report because the taxpayer has a due process right to ensure that the Tax Court complied with Rule 183(c)'s statement that the recommended findings of fact of the

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[2] Petitioners' reliance (Pet. 17) on *Mazza* v. *Cavicchia*, 105 A.2d 545 (N.J. 1954), is misplaced. *Mazza* rests on state law grounds that are independent of federal law. Moreover, the court in *Mazza* concluded that, since a judge may not consider matters outside of the record in deciding a case, a hearing examiner's report could not be used by a judge unless the report were made part of the record. *Id.* at 554-555. That view erroneously conflates the evidentiary record and deliberations based on that record.

special trial judge are presumed correct and that due regard be given to the circumstance that the special trial judge had the opportunity to evaluate the credibility of the witnesses. Under 26 U.S.C. 7482(a)(1), the courts of appeals review "decisions" of the *Tax Court* "in the same manner and to the same extent" as decisions of the district courts in civil actions tried without a jury. The report of a special trial judge is plainly *not* the "decision" of the Tax Court. 26 U.S.C. 7459; T.C. R. 183(b). Only the decision of the Tax Court, not any "original" recommendation that may have been made by a special trial judge, is the subject of the appellate jurisdiction of the court of appeals.

Moreover, as the court of appeals emphasized in this case, Pet. App. 7a, 13a-14a, petitioners' contention that Rule 183 may have been violated is completely belied by the fact that Chief Judge, Dawson, and Special Trial Judge Couvillion signed orders stating that the decision of the Tax Court was the opinion of the special trial judge. *Id.* at 102a ("Judge Dawson states and Special Trial Judge Couvillion agrees, that * * * Judge Dawson adopted the findings of fact and opinion of Special Trial Judge Couvillion, that judge Dawson presumed the findings of fact recommended by Special Trial Judge Couvillion were correct, and that Judge Dawson gave due regard to the circumstances that Special Trial Judge Couvillion evaluated the credibility of witnesses."); accord *id.* at 108a. Even petitioners concede that the statement that the opinion of the special trial judge was adopted evidences that the opinion issued by the Tax Court states "the final views of the [special] trial judge." Pet. 9. Thus, even assuming that the special trial judge had a view of Kanter's case at the time the judge submitted his "original" report that differed from the views that are reflected in

the opinion ultimately entered in the case, it does not follow that the opinion adopted by the Tax Court was not, in fact, the opinion of the special trial judge.

Petitioners assert that the Tax Court routinely makes changes to the "original" reports prepared by special trial judges without telling the parties. Pet. 4-7. Petitioners claim (Pet. 6) that this is evidenced by the absence of any case decided since Rule 183's adoption in 1984 in which the Tax Court disagreed with a recommended finding by a special trial judge. During the period from 1976 through 1984, however, when parties were provided copies of reports of special trial judges and afforded an opportunity to file exceptions thereto, there were only six cases (out of approximately 680 decisions) in which the Tax Court did not adopt the opinion of the special trial judge. In only one of those opinions, moreover, did the reviewing judge of the Tax Court disagree with or "reverse" the special trial judge. See *Kansas City S. Ry.* v. *Commissioner*, 76 T.C. 1067 (1981); *Narver* v. *Commissioner*, 75 T.C. 53 (1980); *Hilton* v. *Commissioner*, 74 T.C. 305 (1980); *La Fargue* v. *Commissioner*, 73 T.C. 40 (1979); *Orzechowski* v. *Commissioner*, 69 T.C. 750 (1978); *C. Blake McDowell, Inc.* v. *Commissioner*, 67 T.C. 1043 (1977), vacated and remanded, 576 F.2d 718 (6th Cir.), on remand, 71 T.C. 71 (1978), aff'd, 652 F.2d 606 (6th Cir. 1980).[3] There is thus no factual basis for petitioners' assertion that when (as in the present case) the Tax Court issues an

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[3] In several other cases (14 out of approximately 680 cases involving special trial judges that were decided between 1976 and 1984), the Tax Court adopted the opinion of the special trial judge with modifications that were, in most instances, described as "minor." See *Ocean Sands Holding Corp.* v. *Commissioner*, 41 T.C.M (CCH) 1, 2 (1980).

opinion that adopts the report of a special trial judge, it fails accurately to set forth the view of the special trial judge in the case.

At bottom, petitioners challenge the authority of the Tax Court, without public disclosure, to communicate or collaborate with a special trial judge about a case after the judge submits an "original" report to the Chief Judge under Rule 183(b). Yet nothing in Rule 183 forbids such communications, nor does Rule 183 prevent the special trial judge himself from modifying his recommended findings based upon that collaborative process. Nor would such non-public communications or collaborations violate due process. Internal communications among judges and special trial judges are part of the internal deliberative process of the court. Pet. App. 109a. As explained by the court of appeals, "there is nothing unusual about judges conferring with one another about cases assigned to them," and, as a result of such conferences, judges sometimes change their original position or thoughts. *Id.* at 13a-14a (quoting *Ballard*, 321 F.3d at 1043). See *Checkosky* v. *SEC*, 23 F.3d 452, 489-490 (D.C. Cir. 1994) ("[i]n agencies as in courts, votes are not final until decisions are final; and decisions do not become final until they are released, accompanied by an explanation of the reasons for the result"; "the exchange of draft opinions can and does change votes").

Moreover, as discussed above, the record demonstrates that the opinion of the court *does* accurately set forth the opinion reached by Special Trial Judge Couvillion. Pet. App. 98a, 103a. As the court of appeals noted, where (as here) an opinion entered accurately states the views of the special trial judge, any differing preliminary recommendation would no longer have any relevance, because it would not constitute a valid

statement of the special trial judge's view of the case. *Id.* at 13a; accord *Ballard*, 321 F.3d at 1042-1043; *Estate of Lisle*, 341 F.3d at 384.

d. Contrary to petitioners' contention, the court of appeals correctly concluded that Rule 183 does not require regular judges of the Tax Court to review the recommended findings of a special trial judge under a "clearly erroneous" or other deferential standard of review. Pet. App. 8a-9a; see *id.* at 75a (Cudahy, J., concurring in part and dissenting in part) ("I agree with the majority's determination that Rule 183 imposes no requirement of disclosure or of clearly erroneous deference upon the Tax Court."). Rule 183 simply does not embody a "standard of review" in the traditional sense. As discussed, the findings that are reviewed on an appeal from a decision of the Tax Court are the factual findings of the regular judge of the Tax Court. 26 U.S.C. 7443A(c); see, *e.g.*, *Heim*, 251 F.2d at 45-46; *Estate of Varian*, 396 F.2d at 755; *Towers*, 247 F.2d at 237; *Erhard* v. *Commissioner*, 46 F.3d 1470, 1476 (9th Cir.), cert. denied, 516 U.S. 930 (1995). See also, *Morgan*, *supra*; 26 U.S.C. 7460(b).

Because responsibility and authority for the findings and decision is vested in the regular judge assigned to the case and with the Tax Court itself (26 U.S.C. 7443A(c)), Rule 183 does not (and indeed, it could not) permit a regular judge to subordinate his or her judgment as to the findings or decision to that of a special trial judge. See Pet. App. 8a (Rule 183 merely instructs the regular judge "to be cognizant that the [special trial judge] had the opportunity to evaluate the credibility of witnesses"); see also, *e.g.*, *Colorado* v. *New Mexico*, 467 U.S. 310, 317 (1984) (in reviewing exceptions to findings of a special master, the special master's findings "deserve respect and a tacit presumption of correctness"

but "the ultimate responsibility for deciding what are correct findings of fact remains with us"); *Renegotiation Bd.* v. *Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 185 n.22 (1975) (review limited by "a clearly erroneous or some other deferential standard" would grant "de facto decisional authority").

Petitioners argue (Pet. 25-29) that the court of appeals' reading of Rule 183 conflicts with *Stone* v. *Commissioner*, 865 F.2d 342, 344-347 (D.C. Cir. 1989), rev'g *Rosenbaum* v. *Commissioner*, 45 T.C.M. (CCH) 825 (1983), which held that former Rule 182(d) required that the Tax Court review the recommended findings of the special trial judge for clear error. Petitioner is mistaken. As Judge Cudahy pointed out (Pet. App. 76a-79a), *Stone* was decided under the prior rules of the Tax Court, under which litigants were furnished with copies of special trial judges' recommended findings and conclusions and then were given an opportunity to take exception thereto, with only the exceptions being reviewed by a regular judge of the Tax Court. T.C. R. 182(b) and (c), 60 T.C. 1149 (1973); see *Freytag* v. *Commissioner*, 904 F.2d 1011, 1015 n.8 (5th Cir. 1990), aff'd, 501 U.S. 868 (1991). When the Tax Court adopted Rule 183 in 1983 (effective January 16, 1984), it withdrew the provisions requiring litigants to be furnished with copies of reports of special trial judges and to file exceptions thereto. See notes to Rule 183, reproduced at 81 T.C. 1045, 1070 (1983) ("The prior provisions for service of the Special Trial Judge's report on each party and for the filing of exceptions to that report have been deleted.").

By eliminating the procedures for disclosure and the filing of exceptions, the Tax Court Rules now make it clear that review by a regular judge of a special trial judge's report is not in the nature of an appellate

review but is an exercise of the regular trial judge's original fact-finding authority. T.C. R. 183; see Pet. App. 76a-77a (Cudahy, J., concurring in part and dissenting in part). And although the D.C. Circuit has cited *Stone* since Rule 183 was amended, see *Landry* v. *FDIC*, 204 F.3d 1125, 1133, cert. denied, 531 U.S. 924 (2000), that decision neither involved the correct interpretation of the current Tax Court Rule nor considered whether Rule 183 requires deference under a clearly erroneous standard of review notwithstanding the Tax Court's determination to withdraw procedures for service and exceptions to a special trial judge's report. Finally, as discussed, because the Tax Court decision in this case in fact adopts in whole "the findings of fact and opinion of Special Trial Judge Couvillion," Pet. App. 102a, the issue of whether Rule 183 requires particular deference to the recommended findings of the special trial judge is entirely moot. *Id.* at 7a.

e. Petitioners' also assert that they are entitled to the special trial judge's so-called original report by virtue of "long-established judicial practice." Pet. 16. Unlike litigation that must be assigned to an Article III court for adjudication, however, tax cases are "public rights" cases, which "Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." *Crowell* v. *Benson*, 285 U.S. 22, 50 (1932) (quoting *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1855)); see *North Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 68, 70 n.22 (1982); *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929). See *Morgan*, *supra*.[4] During the first two years after creation of the

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[4] Although petitioners note that this case involved a civil fraud penalty (Pet. 8), public rights cases include tax cases in which the

Board of Tax Appeals (the predecessor to the Tax Court), decisions of the Board were not appealable. Instead, a litigant dissatisfied with the decision in the case had to bring a separate action in an appropriate court to challenge the Board's decision. Congress subsequently created a statutory right of direct review of decisions of the Board of Tax Appeals. *Old Colony Trust Co.* v. *Commissioner*, 279 U.S. 716, 721 (1929).

Nor were tax cases subject to procedures at common law similar to those of present day Article III courts. At common law, tax cases were resolved in a branch of the "court of exchequer" and were not "judicial controversies * * * according to the ordinary course of the common law or equity." *Murray's Lessee*, 59 U.S. (18 How.) at 282. The Exchequer was a "department" in which "a court [of revenue] [was] held before the Treasurer," and which was "probably the nearest approach to a body of administrative law that the English legal system has ever known; and the court of Exchequer, sitting as a court of Revenue, is the nearest approach to an administrative court."[5] 9 W. Holdsworth, *A History of English Law* 231, 239 (1926). See

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Government asserts penalties. See *Atlas Roofing Co.* v. *Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 450 (1977) (emphasis added) ("public rights" doctrine extends to cases that involve "taxes * * * *together with penalties*"); *Helvering* v. *Mitchell*, 303 U.S. 391, 401 (1938) (noting that the civil fraud penalty is "provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud").

[5] Petitioners' reliance (Pet. 15-16) on *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), is misplaced. *Mathews* involved a party's right to a hearing before being deprived of property. Kanter received a full pre-deprivation hearing. *Mathews* requires no more—and often much less.

A. Carter, *A History of the English Courts* 51 (7th ed. 1944). Accordingly, due process does not prohibit the use of procedures in federal tax cases similar to those sustained in *Morgan* or mandated by Congress in 26 U.S.C. 7460(b), and does not require that the Tax Court operate in a manner identical to Article III courts. Indeed, taxpayers who wish to avail themselves of an Article III forum can do so by paying the asserted deficiency and suing for a refund in accordance with the procedures set forth in 26 U.S.C. 7422, 6511, 6532.

2. There is also no merit to petitioners' assertion (Pet. 21) that 26 U.S.C. 7461(a) and 7459(b) require that "original" reports of special trial judges be included in the record. Petitioners raised no issue under Section 7461(a) in his briefs below, and referred to Section 7459(b) for the first time in their reply brief. The contentions thus were waived in the court of appeals (*United States* v. *Magana*, 118 F.3d 1173, 1198 n.15 (7th Cir. 1997), cert. denied, 522 U.S. 1139 (1998)), and are therefore not properly before this Court. *TRW Inc.* v. *Andrews*, 534 U.S. 19, 34 (2001); *Holly Farms Corp.* v. *NLRB*, 517 U.S. 392, 400 n.7 (1996); *Lawn* v. *United States*, 355 U.S. 339, 362 n.16 (1958).

In any event, 26 U.S.C. 7461(a) does not require disclosure of documents prepared by a special trial judge but states that "reports of the Tax Court" and "evidence" received by the court are public records that are open to inspection by the public. See H.R. Conf. Rep. No. 844, 68th Cong., 1st Sess. 30 (1924) ("the Board shall make a report * * * of its findings of fact and its opinion and decision in each case * * * [and] such report and all evidence received by the Board shall be public records"). A report that a special trial judge prepares for submission to the chief judge and is assigned to a regular judge is described in Rule 183(c)

as "the Special Trial Judge's report." It is neither a report "of the Tax Court" nor "evidence."

Similarly, 26 U.S.C. 7459(b) does not require disclosure of a special trial judge's "original" report. Section 7459(b) states that the Tax Court shall report all of "*its* findings of fact, opinions, and memorandum opinions" (emphasis added). As discussed, recommendations in reports of special trial judges are not findings or opinions of the Tax Court.

Petitioners' reliance on 26 U.S.C. 7482 is equally unavailing. That statute provides that courts of appeals are to review "decisions" of the Tax Court "in the same manner and to the same extent" as decisions of the district courts in civil actions tried without a jury. The report of a special trial judge, however, is plainly *not* the "decision" of the Tax Court. As noted above, it is the decision of the Tax Court, not the recommendation of the special trial judge (either initial or final), that is the subject of the appellate jurisdiction of the courts of appeals. Pet. App. 9a.

3. The courts of appeals that have addressed the precise questions presented in this case are fully in accord with the decision of the court of appeals below. In *Ballard*, the Eleventh Circuit rejected the contention that the procedures employed by the Tax Court violated the taxpayer's due process rights. In *Estate of Lisle*, the Fifth Circuit agreed with the decision below and the decision of the Eleventh Circuit in *Ballard*. 341 F.3d at 384. See *Erhard*, 46 F.3d at 1475-1476 (upholding review by a regular judge of special trial judge's recommendation under the procedures in Rule 183(c) in which litigants are not provided a copy of the special trial judge's recommendations). There is thus no conflict or other reason to warrant granting a writ of certiorari in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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